M. MAJUMDER

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[ORIGINATING SUMMONS NO. 31-1840-86]
11 MARCH 1987

CIVIL PROCEDURE: *Interpretation of Privy Council judgment - Jurisdiction of High Court - Mareva injunction.*

The Privy Council, on an appeal against a decision of the High Court, upheld the order subject to the deletion of certain words. The relevant portion of the High Court order is reproduced below, save that the words ordered to be deleted by the Privy Council are now emphasised.

> It is ordered that the defendants do repay the plaintiff the balance sum of RM229,500 paid by the plaintiff to the deceased **on the security of a lien and equitable charge in respect of Lots 290 and 461, Mukim of Kulim, Kedah,** with interests thereon at the rate of 10% per annum ... And it is further ordered that the defendants be and are hereby restrained from transferring, charging or in any way dealing with the said lots:
>
> And it is also ordered that the defendants do pay the plaintiffs the costs of this suit.

The penultimate paragraph, which appears to have a close relationship with the deleted words has been left intact. The penultimate paragraph reads: "And it is further ordered that the defendants be and are hereby restrained from transferring, charging or in any way dealing with the said lots." It is survival of this paragraph which became the bone of the contention in this originating summons.

The property referred to in the Privy Council judgment belonged to one R (since deceased) of whose estate the defendants in that action were the executors and trustees. R had borrowed a sum of RM29,500 and RM25,000 respectively from the plaintiffs in that case of which only RM50,000 had been repaid. The action which culminated in the order of the Privy Council was for the recovery of the balance sum of money.

The applicants in the present originating summons also lent RM100,000 to the executors of the said deceased and also RM17,179.92 to deceased during his life time. The applicant lodged caveats for those two sums of money respectively. The executors executed a transfer of the said lots in pursuance of a promise by the attorney for the deceased. The registration of the transfer however was stone-walled by a Caveat No. 471/84 which had been lodged by the plaintiffs in connection with the previous case. The plaintiffs in the previous case opposed the removal of the said caveat which resulted in their becoming protagonists in the present case.

The matter was referred with the consent of the parties to the present Judge.

Held:

[1] The matter resolved around a High Court order which was restored by the Privy Council subject to the deletion of certain words. The Court had inherent jurisdiction to determine how an order should be worked out.

[2] There was no question of there being preferential dealing in order to evade the execution of the High Court order. The plaintiffs may have been referring to provisions in bankruptcy law, which however had no relevance to the previous civil suit or originating summons herein.

[3] The present applicants being *bona fide* purchasers for value had the necessary *locus standi*, having been aggrieved parties.

[4] It was contended that, there being no ambiguity in the Privy Council Order, it could only bear the interpretation that the Privy Council wanted to maintain the *status quo* and the said lots should remain available to the plaintiffs for the purpose of the execution of judgment for the money due. This argument would have had great force if it was a Mareva injunction that the learned Judicial Commissioner had in mind.

[5] It was, however, not a Mareva injunction but an injunction to enable an equitable charge which, in the present case, was a temporary security to be executed.

[6] Since the plaintiffs were not in a position to challenge and did not in fact challenge the validity of the transaction between the former attorney for the deceased and the applicant, the argument that the survival of the injunction was to enable the conflicting claims of the plaintiffs and any other party to be determined, could not be upheld.

[7] The injunction existed to shore up the equitable charge. With the removal of that part of the order for the payment of the judgment sum to be secured by the lien, the necessity for the injunction also ceased to exist.

[Order in favour of the applicants who asked for the caveat No. 471/84 to be removed, subject to a stay of execution pending appeal to the Supreme Court.]

Cases referred to:
Manilal & Sons (M) Sdn. Bhd. v. Mahadevan & Anor. [1986] CLJ (Rep) 26
Frits v. Hobson [1880] 14 Ch D 3422
Zainal Abidin v. Century Hotel Sdn. Bhd. [1982] 1 MLJ 260
Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd. [1984] 2 CLJ (Rep) 319

Legislation referred to:
Bankruptcy Act 1967, s. 53

For the applicant - Rahim Noor; M/s. Maxwell, Kenion, Cowdy & Jones
For the Manilal & Sons (M) Sdn. Bhd. - Mr. Gan Teik Chee; M/s. Gan Teik Chee & Ho

JUDGMENT

Peh Swee Chin J:

An order dated 30 August 1986 made by the Privy Council in Civil Appeal No. 10 of 1985, *viz*. the case of *Manilal & Sons (M) Sdn. Bhd. v. Mahadevan & Anor;* [1986] CLJ (Rep) 26 lay in the heart of the matter in this originating summons. This order upheld and restored another order made in Ipoh High Court Civil Suit No. 235 of 1974 made on 22 March 1974 made on 22 March 1983, except that the words: "on the security of a lien and equitable charge in respect of Lots 290 and 461, Mukim of Kulim, Kedah" were ordered to be deleted from High Court's order dated 22 March 1983, (hereinafter called the High Court order.)

The body of the High Court order is reproduced below, save that the words ordered to be deleted by the Privy Council, will be underlined now for the purpose of clarity.

Civil Suit No. 235 of 1974

Between

Manilal & Sons (M) Sdn. Bhd. Plaintiff

And

1. Mahadevan s/o Mahalingam

2. Sandra Segera s/o Mahalingam Sued as the Executors and Trustees of the Estate of Mahalingam Ratnavale, deceased defendants

Before The Honorable Mr. Justice Anuar bin Dato' Zainal Abidin

2 March 1983 **In Open Court**

ORDER

The action having been tried before the Honorable Judicial Commissioner Mr. E.E. Sim on 18 September 1981, 9 December 1981, 23 June 1982, 24 June 1982, 25 June 1982, 3 August 1982, 4 August 1982 and 5 August 1982 in the presence of Mr. Gan Teik Chee of Counsel for the plaintiff above named and Mr. W.S.W. Davidson of Counsel for the defendants abovenamed and coming up for judgment this day.

It Is Ordered that the defendants do repay the plaintiff the balance sum of RM229,500 paid by the plaintiff to the deceased on the security of a lien and equitable charge in respect of Lots 290 and 461, Mukim of Kulim, Kedah, with interests thereon at the rate of 10% per annum compound interest with yearly rests from 21 June 1968, to date of delivery of judgment and thereafter at 8% per annum to date of satisfaction:

And It Is Ordered that the defendants be and are hereby restrained from transferring, charging or in any way dealing with the said Lots:

And It Is Also Ordered that the defendants do pay the plaintiff costs of this suit.

Dated 22 March 1983.

Yet for reasons which had not been expressly dealt with by their Lordships in the Privy Council, the penultimate paragraph of the High Court order, (which appeared *prima facie* to have close connection with those deleted words set out earlier), has remained extant and intact, it not having been deleted. The penultimate paragraph, for convenience, is set out below:

It Is Ordered that the defendants be and are hereby restrained from transferring, charging or in any way dealing with the Lots.

The survival of this paragraph became the bone of contention in this originating summons in relation to the said Lots, *viz*. Lot 290 and Lot 461, Mukim of Kulim, Kedah, (hereinafter called the said Lots).

It would be necessary to recapitulate the facts leading to the originating summons being filed herein, (hereinafter called the O.S.).

First in the High Court Civil Suit 235/74, (hereinafter called the said Civil Suit), which started it all, in connection with some rather complicated transactions, the plaintiff, (the appellant in the Privy Council case), paid one Ratnavale, since deceased, (of whose estate, the defendants were and have been executors and trustees), two sums of RM29,500 and RM250,000 respectively, to account of which, the said deceased repaid RM50,000. The claim by the plaintiff was for the difference between sums paid to the deceased and the sum repaid by deceased during the life time of the deceased. At some apparent but not real risk of simplification, and to cut the story short, the learned Judicial Commissioner found to the effect that the sums paid to the deceased were paid on the security of a lien and an equitable charge in respect of the said Lots belonging to the deceased, as a temporary security pending sale of certain property referred to as Meera Estate and the division of proceeds of sale therefrom, and with such sale, the payment by the plaintiff to the said deceased was also connected. The said sale was not successful, and apparently the plaintiff pressed for repayment of the sums paid to the deceased.

Apparently before the said Civil Suit was filed, the deceased had asked for extension of time to pay the outstanding balance of RM229,500 with a promise to pay interest thereon. The request was granted, but default was made in the payment of the said balance with the result that the said Civil Suit was filed claiming the said balance.

Before filing the said Civil Suit, the plaintiff had lodged another caveat, bearing presentation No. 471/81, (hereinafter called caveat No. 471/81), Jil. 6 Fol. 37 over the said Lots. In the statutory declaration made in support of the application for lodging caveat No. 471/81, the managing director of the plaintiff/company stated, in short, that the said deceased, had agreed to charge the said Lots as security for payment of the said sum of RM250,000 to the deceased, (i.e. one of the aforesaid two sums paid to the deceased). He stated further that the documents of title were given to some solicitors for the intended charge. These documents of the title were taken from the solicitors by the deceased without plaintiff's consent. Not having the documents of title, the plaintiff did not appear to have acquired a valid lien albeit the entry of the said caveat No. 471/81. This perhaps could explain why the deceased and the plaintiff in connection with the said Civil Suit had agreed to a temporary security in the form of an equitable charge also pending the sale of the said Meera Estate.

Having dealt very briefly with the said Civil Suit, I now deal with the event leading to the filing of the OS. The applicant in the OS (hereinafter called the said applicant), also lent a sum of RM100,000, not to the deceased, but to the executors of the deceased, who were defendants in the said Civil Suit, and also lent another sum of RM17,179.92 to the deceased in the latter's life time. The applicant lodged caveats for these 2 sums of money respectively. The executors agreed to transfer the said Lots to the applicant in pursuance of a promise by the attorney for the deceased made in writing on 27 February 1973. The executors had executed the necessary transfer the registration of which however was stonewalled by the said caveat No. 471/84; hence the OS was filed asking for the removal of the said caveat No. 471/84 lodged by the plaintiff in connection with the said Civil Suit. The plaintiff in the said Civil Suit, (hereinafter called the said plaintiff), opposed the removal of the caveat No. 471/84, thus making this time, the said plaintiff and the said applicant, the protagonists instead of previously the said plaintiff and the said executors in the civil suit.

On the hearing of the OS, the Court suggested if the matter in question could be referred to Privy Council, but both parties asked to have the matter adjudicated here before me, with a rider added by learned Counsel for the said plaintiff to safeguard his position should presumably this Court be found by a higher Court to have lacked jurisdiction in adjudicating on the matter in question, that such jurisdiction could not be conferred by consent of both parties herein. This question of lack of jurisdiction will be dealt with by me in the later part of my judgment.

In the final analysis, the matter revolved round the interpretation, or rather the working-out of the High Court order in question, which was restored by the Privy Council subject to the deletion of certain words as set out above. In my view, it is settled that this Court has inherent jurisdiction to determine as to how an order should be worked out, i.e. should, of course, difficulty arise as to how matters in the order should be further deal with. This gives rise to the remedy of granting liberty to the parties in a given case to apply to the Court for this purpose. It was held in *Frits v. Hobson*, [1880] 14 Ch D 3422 that such liberty to apply was implied without its being expressly reserved. The spectre of lack of jurisdiction raised by the learned Counsel for the said plaintiff should therefore be laid to rest.

The contentions of the applicant can be summarised as follows. Pursuant to order or judgment of the Privy Council restoring and altering in part, the High Court order as described above, the plaintiff no longer had interest in the said Lots capable of sustaining its caveat; i.e. caveat No. 471/84. It was argued also that the injunction was consequent to the equitable charge and lien in the High Court order and since the lien and equitable charge were removed by the Privy Council, all that was left was a judgment for money lent and the injunction, (that was not deleted), did not make sense.

It was first contended for the plaintiff that the attempted transfer of the said Lots by the executors to the applicant amounted to a preferential dealing for evading execution of the High Court order which was restored by the Privy Council. I pause here to observe that the plaintiff has not seized the said Lots by prohibitory order in execution of the High Court order since 30 August 1984, when the Privy Council delivered its judgment though it was not prevented from doing so by any stay of execution. The plaintiff must have relied on the surviving injunction contained in the High Court order to take its own sweet time for doing so.

The contention of preferential dealing was of no substance at all. Possibly the plaintiff had in mind, from the point of view of bankruptcy law, about a transfer by a person, unable to pay his debt, to another, of some property, with a view to giving that other person preference over other creditors, in which case, under s. 53 of Bankruptcy Act, of 1967 such a transfer would be deemed fraudulent and void against the Official Assignee if the transferor is adjudged bankrupt on a petition presented within 3 months after the date of the transfer, unless the transfer was in good faith and for a valuable consideration. Bankruptcy law has had nothing to do with the facts in issue in the civil suit and the OS herein.

It was also contended by the plaintiff that applicant had no *locus standi* to apply for removal of the said caveat No. 471/84.

In my view, the applicant, being in the position of a *bona-fide* purchaser for valuable consideration had every right to apply for its removal and had therefore the necessary *locus standi*, for having been an aggrieved party.

It was next contended by the plaintiff to the effect that the High Court order, after its amendment by the Privy Council, gave rise to no ambiguity and meant what it said. In other words, the non-deletion of that part of the High Court order relating to the injunction was not a mistake due to oversight on the part of the Privy Council. Learned Counsel for the plaintiff said he had himself appeared in the same appeal before the learned Law Lords in the Privy Council and that they were aware of such injunction but they ignored it. Learned Counsel referred to the penultimate paragraph of the judgment of the Privy Council in this case, i.e. *Manilal & Sons (M) Sdn. Bhd. v. Mahadevan & Anor, supra*, in support of his contention, that the Privy Council wanted to maintain the *status quo*, i.e. the said Lots should remain available for the plaintiff for the purpose of the execution of judgment for the money due, and for conflicting claims of parties, (other than those in the Privy Council) and the plaintiff to be decided, e.g. for determination as to whether the equitable charge should be executed for the plaintiff or whether the transfer from the applicant should be registered.

In my view, the argument of the learned Counsel, though ingenious and persuasive, was nothing more than a forlorn hope.

The survival of the order for injunction could not have been perpetuated deliberately by the learned Law Lords for the purpose of making available the said Lots to the plaintiff for the ease or convenience of enforcement of the judgment or order for the payment of money.

This submission at first, led me to speculate on whether it was a Mareva injunction that the learned Judicial Commissioner had in mind. This submission had therefore a great deal of initial force but I found it had not true merit.

It was not a Mareva injunction because it was never applied for on that basis at all. The injunction was to all intents and purposes, in my view, to enable an equitable charge to be executed and such equitable charge was found by learned Judicial Commissioner to be a temporary security for the payment to the deceased of those 2 sums, pending the sale of Meera Estate. The injunction in the High Court order was thus a horse of a different colour as compared with a Mareva injunction. Please see the grounds for such injunction in *Zainal Abidin v. Century Hotel Sdn. Bhd.* [1982] 1 MLJ 260 and *Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd.* [1984] 2 CLJ (Rep) 319. More reasons would be given later. In other words the plaintiff had not applied in the High Court suit for it on the ground, for example, of assets being disposed of with the intention or a real risk of making them not available for execution of a judgment to be obtained later. The underlining is again mine. The injunction in the High Court order does not appear to be an interlocutory one. No condition, for example, was imposed for an undertaking as to damages in the said Civil Suit. Some caveats were in any event, already lodged by the plaintiff, and the executors had never threatened at that stage to have them removed. Such caveats lodged by the plaintiff would have made any application for a Mareva injunction superfluous therefore most unlikely.

It was also contended that the survival of the injunction was to enable the conflicting claims of the plaintiff and a party (other than the parties in the High Court suit) to be determined or resolved. The plaintiff here was in no position to challange, and did not challenge in fact, the validity of the transaction between the former attorney for the deceased and the applicant who had claimed the right to be registered as transferee on the ground of being a *bona fide* purchaser for valuable consideration.

Again, as regards the suggestion that the learned Law Lords were aware of the injunction remaining on the High Court order and "had ignored it"; would not a more efficacious answer be that, for ignoring it, the learned Law Lords would have said, if they were subsequently reminded of it: "Oh, we did not take the trouble to remove it, would not its removal be too obvious in the circumstances?"

In my judgement, whatever claim the plaintiff had in the early part of its dispute with the executors of the deceased, the plaintiff had chosen to cast its claim when issuing the writ, in the form of a claim for money lent. The High Court order was, in fact, a mere order or judgment for the payment of money. Whatever right the plaintiff had to any claim of a non-pecuniary nature, such right had merged in the order of judgment so that such right, if it existed, had been extinguished by an order for the payment of money only.

If the learned Judicial Commissioner thought it fit to make a further order for the payment of such judgment sum to be secured by a lien or equitable charge over the said Lots, the learned Law Lords had deemed it fit to have such further order removed.

One should again consider the surviving order for injunction in the context of what has been stated. Why was the order for injunction made? Before it was made, from the affidavits and exhibits attached thereto and filed herein, it could not be disputed that the documents of title in respect of the said Lots were then in the hands of the said executors. The plaintiff could not have an effective lien albeit the entry of caveats, hence the order for an equitable charge, coupled with an injunction against the said executors restraining them from

transferring etc. the said Lots. From the facts or circumstances the only rationale for making the order for the injunction, was to shore up the said equitable charge and to enable it to be executed.

In my judgment, the necessity for the injunction, (with the removal of that part of the order for the payment of the judgment sum to be secured by the lien and equitable charge), had ceased to exist.

I therefore made the order in favour of the applicant who had asked for the caveat No. 471/84 lodged by the plaintiff against the said Lots to be removed but granted a stay of execution in favour of the plaintiff on its professed intention to appeal to the Supreme Court. I further awarded costs to the applicant.

Also found at [1988] 2 CLJ 223